



May 21, 2001

Ms. Maria Dolores Cordova
City Secretary
City of Jourdanton
1220 Simmons Avenue
Jourdanton, Texas 78026

OR2001-2089

Dear Ms. Cordova:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 147478.

The City of Jourdanton (the "city") received a request for information, paraphrased as follows:

1. For the period from October 1999 through March 2, 2001, all records relating to the pending lawsuit filed by Keith Gordon against the city. This request includes pleadings, depositions, transcripts, correspondence, and all invoices for payment of legal, investigation, and/or other fees related to the litigation.
2. All posted agendas for city council meetings which indicate the above-referenced litigation as an agenda item, and the official meeting minutes, audio, and/or video recording of each meeting.
3. All written reports prepared by the mayor, the city manager, the city secretary, the city attorney, and/or a city council member which mention the above-referenced litigation.

You have submitted for our review documents which appear to be responsive to item 1 of the request. You claim that the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As to requirement number one, you have submitted no comments in support of the section 552.108 assertion. As to requirement number four, the submitted information does not include any information responsive to items 2 and 3 of the request, nor does the submitted information include any invoices for payment of legal, investigation, and/or other fees related to the litigation. *See* Gov't Code § 552.022(a)(16). You do not represent that the submitted information comprises a representative sample of the information responsive to the request, nor do the submitted documents appear to be truly representative of all of the information requested. Thus, you did not properly comply with the fourth requirement.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office all of the information required in section 552.301(e) results in the legal presumption that the information is public and must be released "unless there is a compelling reason to withhold the information." Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has long held that a compelling reason sufficient to overcome the section 552.302 presumption of openness may exist where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). But sections 552.103 and 552.108, asserted by the city on its own behalf, are discretionary exceptions that do not demonstrate a compelling reason sufficient to overcome the section 552.302 presumption of openness.¹ None of the responsive information may be withheld under section 552.108. In addition, to the extent there exists information responsive to the request that the city did not submit to this office for review, such

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

information may not be withheld under section 552.103 or section 552.108. We next address the section 552.117 assertion.

Section 552.117(2) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of peace officers, regardless of whether the officer elected confidentiality under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). The submitted documents contain information that is excepted from disclosure under section 552.117(2). The city must withhold those portions of the responsive records that reveal a peace officer's home address, home telephone number, social security number, and that reveals whether the officer has family members. The city must also withhold the officer's *former* home addresses and telephone information. *See* Open Records Decision No. 622 (1994). The plain language of section 552.117 does not cover an officer's fingerprints. Therefore, the city may not withhold fingerprints under section 552.117. We have marked the information in the submitted documents that is subject to section 552.117(2). If the responsive information that was not submitted to this office contains information such as that which we have marked in the submitted documents as excepted under section 552.117(2), such information must also be withheld. *See* Open Records Decision No. 670 at 6 (2001) (all governmental bodies may withhold information excepted under section 552.117(2) without the necessity of seeking an attorney general decision as to that exception); *see also* Open Records Decision No. 673 (2001). Next, we address the section 552.103 assertion with respect to the submitted documents.

In relevant part, section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal*

Found., 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a). Further, information must be pending or reasonably anticipated on the date the information is requested. Gov't Code § 552.103(c).

You represent to this office that litigation is pending. The submitted information includes pleadings that demonstrate the city is a party to the litigation, and that litigation was pending on the date the information was requested. Upon review of the issues in the litigation as indicated in the submitted pleadings, we also find that the submitted information relates to the litigation. Accordingly, except as noted below, the city may withhold the submitted documents under section 552.103(a).

Some of the submitted documents have apparently been filed with a court. Section 552.022(a)(17) of the Government Code provides that information that is also contained in a public court record is not excepted from disclosure under the Act and must be released unless expressly confidential under other law. *See* Gov't Code § 552.022(a)(17). Section 552.103(a), as noted above, is a discretionary exception under the Act. Thus, section 552.103(a) is not other law that makes information expressly confidential. Accordingly, to the extent the submitted information is also contained in a public court record, such information is not excepted from disclosure under section 552.103(a) and it must be released. In addition, generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Much of the submitted information, including the discovery responses and some of the correspondence, either came from or has been made available to the opposing party. This information may not be withheld under section 552.103(a) and it must be released. To the extent the submitted documents have not been made available to the opposing party and are not subject to section 552.022(a)(17), the city may withhold these documents from the requestor under section 552.103(a). We further note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Other than the possible applicability of section 552.117(2) (explained above) to the responsive information that was not submitted for our review, no compelling reason for withholding any of this information has been demonstrated. We thus find that this information must be released pursuant to section 552.302. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352. However, to the extent there exists responsive information that was not submitted to this office for review, we have no basis for concluding that this information is confidential. Accordingly, we have no choice but to order the information released in accordance with section 552.302.

If you believe the information is confidential and cannot lawfully be released, you must challenge this decision in court as outlined below.

In summary, the city may withhold from the requestor the submitted documents, under section 552.103(a), to the extent this information is not also contained in a public court record and has not been made available to the opposing party in the pending litigation. The remaining responsive information must be released pursuant to section 552.302, except the city must redact information that is excepted from disclosure under section 552.117(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

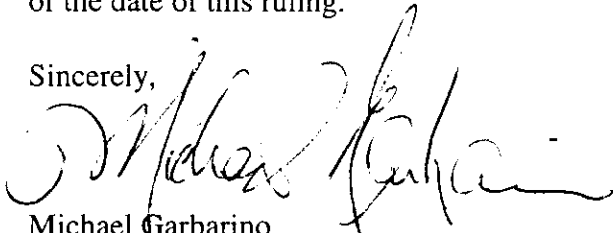
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 147478

Encl. Submitted documents

cc: Ms. Patricia J. Elizabeth Tymrak-Daughtrey
P.O. Box 23
Jourdanton, Texas 78026
(w/o enclosures)